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Date: 6/17/2022 4:02:10 PM
Subject: RE: [Non-DoD Source] Bradford Island NPL Site

Dear Tom,

It was good seeing you at the joint government-to-government consultation meeting in Toppenish. And thank you for your email regarding the group that came to be known as the technical advisory group (TAG) concerning Bradford Island cleanup.

You may recall that the TAG grew out of USACE's original community involvement plan, and public outreach. Over time, the only community members that showed up on a regular basis were employees or consultants of federal, state, or tribal governments.

In assessing whether USACE was meeting public involvement requirements, it became apparent that the TAG was no longer serving that purpose. USACE's utilization of this group, composed of non-governmental members, for advice and recommendations implicated FACA. Other interested community members and groups are also allowed to have a meaningful opportunity to comment on remedial planning in the CERCLA process, as well as the participants of the TAG.

The involvement of the Yakama Nation and other tribes in review and comment on Bradford Island remedial planning is not the same as the lead regulator or state support agencies. In the absence of tribal jurisdiction over this federal facility, the Yakama Nation is not in the same position or role as a state. Nonetheless, USACE recognizes the Tribe's trustee status, and understands a Trustee's role under the statute and in the NCP.

USACE also recognizes the Yakama Nation's Treaty rights and interest in the Bradford Island cleanup, and will continue to uphold our policies to engage and consult with all the interested tribes regarding Bradford Island response actions. However, our consultations cannot infringe on our obligations to comply with the NCP's public involvement requirements.

As USACE explained, there are two avenues for tribal involvement—community involvement (including participation in a community advisory group (CAG)) and government-to-government consultation. In addition to annual consultation meetings between USACE, EPA, and Yakama Nation leadership, perhaps we can discuss whether participation in a tribal group as a subcommittee of the CAG would be beneficial for your client and the other interested tribes.

USACE looks forward to resuming broad community involvement and robust consultation with federally recognized tribes. We hope the Yakama Nation can be a part of that process.

Best,
Jeff

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Subject: [Non-DoD Source] Bradford Island NPL Site

Dear Jeff,

It was good to meet up with you again at the Yakama Tribal Council session on April 5 regarding the Bradford Island NPL Site. I am contacting you about the Army Corps of Engineers' recent press release and May 5 email to the Government Team for Bradford Island (EPA, Oregon, Washington, USFWS, Yakama Nation and others), and also a May 9 telephone conversation between Laura Shira from Yakama Nation Fisheries and Chris Budai (ACOE). We understand it is the Corps' intention to completely disband the Technical Working Group (TWG) or Technical Advisory Group (TAG) consisting of technical staff from the Government Team, and instead allow the public to form a Community Advisory Group (CAG), which the Government Team will be allowed to join. The Portland District anticipates the CAG will be led by volunteer community members with meetings typically held after hours at an undetermined frequency.

Your client has stated that the basis for this change is a new and unprecedented interpretation of the Federal Advisory Committee Act (FACA). The Yakama Nation strongly objects to this interpretation. If you and/or your client believes that the legal basis for state and tribal participation in cleanups is FACA or the public participation requirements of CERCLA, you are simply wrong.

Although FACA may certainly apply to any public participation at federal NPL sites (e.g., the Hanford Advisory Board), any CAG or other community advisory group cannot replace the requirements in the statute and the National Contingency Plan (NCP) that the lead agency allow states and tribes, who are trustees for any injured natural resources, act as technical support agencies for any removal or remedial actions at federal facilities. See 42 U.S.C. § 9620(f); 42 U.S.C. § 9604(c)(2); 42 U.S.C. § 9626(a); 40 CFR § 300.500 Subpart F; 40 CFR § 300.615(c)(1). This is not the same as public participation or community relations. 42 U.S.C. § 9617; 40 CFR § 300.430(c); 40 CFR § 300.430(f)(3). Congress and EPA enacted these mandates separately for a reason, and the Corps cannot simply merge the two requirements into one technical advisory group.

Formation and maintenance of a technical group such as the Bradford Island TAG has substantial benefits for the lead agencies to coordinate with the support agencies and trustees. We are engaged with other Government Team members at numerous other sites across the Pacific Northwest where Government Team technical meetings are held on a regular basis (e.g., Portland Harbor, Holden Mine, Hanford Site, Port of Vancouver-Nustar, Alcoa/Evergreen). These Government Team technical meetings come in a variety of formats and frequencies, but have been an effective way to provide input, vent concerns, develop understanding, resolve disputes, and build consensus. Several of these sites also have separate formats for engaging the public, including CAG formats. These dual meeting formats bring efficiencies to the process and help provide a more protective cleanup that all parties can stand behind. In any case the Government Team's technical input cannot be subsumed into the general public or community group engagement, and there must be a workable mechanism for state/tribal support agency participation.

The Yakama Nation will be informing EPA Region 10 that the Corps is in violation of CERCLA and the NCP in eliminating the Bradford Island TAG. We will also be looking to establish the TAG as a mandatory provision of the forthcoming

Federal facility Agreement as well as in a possible Memorandum of Understanding with EPA.

Please contact me at (b)(6) if you want to discuss this matter.

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